

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

JAMES EARL KENNER v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Montgomery County
No. 17308, 17309, 17310, 17311, 17313**

No. M2009-00948-CCA-R3-PC - Filed January 13, 2010

This matter is before the Court upon the State's motion to dismiss or in the alternative to affirm the judgment of the trial court by memorandum opinion pursuant to Rule 20, Rules of the Court of Criminal Appeals. Petitioner, James E. Kenner, has appealed the Montgomery County Circuit Court order dismissing his petition for post-conviction relief in which Petitioner alleged that his guilty plea to five counts of robbery in 1980: (1) were based on an unlawfully and involuntarily entered guilty pleas; (2) were based on Petitioner's lack of knowledge about the right to trial by jury; (3) resulted in the denial of the right to confront witnesses; and (4) were being used to enhance a conviction in another county. Upon a review of the record in this case, we are persuaded that the post-conviction court was correct in dismissing the petition for relief as time-barred and that this case meets the criteria for affirmance pursuant to Rule 20, Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted, and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court
Affirmed Pursuant to Rule 20, Rules of the Court of Criminal Appeals**

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ. joined.

Gregory D. Smith, Nashville, Tennessee, for the appellant, James Earl Kenner.

Robert E. Cooper, Jr., Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

Petitioner pled guilty to five counts of armed robbery on March 21, 1980. He received a sentence of ten years. Petitioner did not appeal those judgments. On April 13, 2009, Petitioner filed a petition for post-conviction relief. On April 16, 2009, the post-conviction court dismissed the

petition because it was time-barred and failed to meet any of the statutorily recognized exceptions. Petitioner timely filed a notice of appeal.

Analysis

In its order, the post-conviction court stated that the petition was filed outside of the one-year statute of limitations. Prior to the adoption of the Post-Conviction Procedure Act, petitions like the present one had to be filed within three years of the date of the effective date of Tennessee Code Annotated section 40-30-102 (repealed 1995). *State v. Abston*, 749 S.W.2d 487, 488 (Tenn. Crim. App. 1988). Accordingly, Petitioner's statute of limitations for the filing of a petition for post-conviction relief began to run on July 1, 1986, the effective date of the enactment of the post-conviction statute, and expired three years later on June 30, 1989. However, the new Post-Conviction Procedure Act, which took effect on May 10, 1995, subsequently shortened the three-year statute of limitations to one year. T.C.A. § 40-30-201 et seq. (Supp. 1996). In *Carter v. State*, the Tennessee Supreme Court held that the new Post-Conviction Procedure Act of 1995 does not afford petitioners for whom the statute of limitations expired prior to May 10, 1995, the effective date of the new Act, an additional year in which to file new petitions for post-conviction relief. 952 S.W.2d 417, 418 (Tenn. 1997). Since July 1, 1995, the statute of limitations for filing a petition for post-conviction relief has been one year from the date of the final action of the highest state appellate court to which an appeal is taken. T.C.A. § 40-30-102(a).

There are three statutory exceptions to the statute of limitations in post-conviction matters. These exceptions are set forth in Tennessee Code Annotated section 40-30-102(b)(1), (2) & (3): (1) claims based on an appellate court ruling concerning a constitutional right not recognized at the time of the trial and given retroactive effect by the appellate courts; (2) claims based upon newly discovered evidence which establishes that the petitioner is actually innocent of the crime; and (3) claims which arise out of a situation where the petitioner received an enhanced sentence for a crime based on previous convictions which were later held to be invalid. Petitioner has not alleged that any of these exceptions applies to his case. Instead, Petitioner claims that the statute of limitations does not apply to him. We disagree. The post-conviction court properly determined that the petition is time-barred.

Conclusion

Rule 20, Rules of the Court of Criminal Appeals provides inter alia:

The Court, with the concurrence of all judges participating in the case, when an opinion would have no precedential value, may affirm the judgment or action of the trial court by memorandum opinion rather than by formal opinion, when:

The judgment is rendered or the action taken in a proceeding before the trial judge without a jury, and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the finding of the trial judge

We determine that this case meets the criteria of the above-quoted rule and, therefore, we grant the State's motion filed under Rule 20. We affirm the judgment of the post-conviction court.

JERRY L. SMITH, JUDGE